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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1411

STATE OF LOUISIANA,

Respondent,

versus

BILLY CHAFFIN,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

STATE OF LOUISIANA,
Respondent,

versus

BILLY CHAFFIN,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Billy Chaffin, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered in the above entitled case on the 9th day of December, 1975 affirming a conviction of the 33rd Judicial District Court, Parish of Allen, entered March 26, 1975. Rehearing was denied by the Louisiana Supreme Court on January 19, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana is as yet unreported and is printed in Appendix I hereto at

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page 1a. The entry of judgment of the 33rd Judicial District Court of Allen Parish is printed in Appendix II hereto, Infra, at page 2a.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on December 9, 1975. A timely petition for rehearing was denied on January 19, 1976. The jurisdiction of the Court is invoked under the mandate of this Court to protect the Constitution of the United States. The case in question involves clear and basic violations of the 4th and 14th amendment guarantees against unreasonable search and seizure and the questions of constitutional law.

QUESTIONS PRESENTED

1. The question is presented whether a search of a residence for marijuana can legally be conducted 50 (fifty) days after one of the residents of the house is reported to have marijuana in his possession or whether such a search violates the fourth and fourteenth amendments of the United States Constitution as being untimely and therefore unreasonable.

2. The question is presented whether an affidavit based upon hearsay evidence obtained from an informant and containing no allegations as to the character or reputation for truthfulness of said informant can properly form the basis of a search warrant or whether the failure to recite that the informant has a reputation for truthfulness violates the 4th and 14th amendments of the United States Constitution.

3. The question is presented whether a search warrant which improperly described the place to be searched can form the basis of a valid search or whether such a search violates the 4th amendment of the United States Constitution.

STATUTE INVOLVED

Amendment IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The home and automobile of the defendant, Billy Chaffin, were searched by public officials of Allen Parish on the 24th day of August of 1975. This search

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was authorized by a search warrant signed by the District Judge pursuant to an affidavit signed by a deputy named Jamie McLaughlin. The affidavit in its entirety reads as follows:

> "The reason and facts for the request of this Search Warrant are: While working as a deputy Sheriff for the Sheriff of Allen Parish as an undercover agent, I met Billy Chaffin of Kinder, La. From information received from the Sheriff's office of Allen Parish, and information I received personally from various persons in Kinder, La., Billy Chaffin was suspected to be a distributor of marijuana and other controlled Dangerous substances. Because of this information, the Sheriff's Office of Allen Parish assigned me to watch the residence of Billy Chaffin, which residence is described above, in Kinder, Allen Parish, La., which residence is occupied by Billy Chaffin's father, and where Billy Chaffin resides, and I then proceeded to keep the Billy Chaffin residence under surveillance. I started writing down the names of persons visiting Billy Chaffin's home and writing down their vehicle license numbers. After a few days the Sheriff's Office advised me to write down the date, time, and vehicle make and model and license numbers and on June 1, 1974 I started doing this, and I attach hereto and make a part of this affidavit the information I obtained while keeping the Billy Chaffin home under surveillance. On the date of July 6, 1974 at approximately 8:10 P.M. I met Larry Duplechian

> of Kinder, La. and asked him if Billy Chaffin could get me a bag of marijuana that Larry had told me earlier that he would try to get for me. About 8:25 P.M. Billy Chaffin drove up and parked beside Larry, and Larry got in Billy's car and a few minutes later Larry got back in his car. I went back to my trailor and Larry arrived at my trailor at 8:35 P.M. and as he entered the trailor he handed me a bag of what I suspected to be marijuana and I paid Larry $10.00 for the suspected marijuana. I then placed the bag of suspected marijuana in an evidence envelope and later I gave it to Deputy Sheriff Floyd Case. Attached hereto and made a part of this affidavit is my statement of this purchase dated July 6, 1974. I have worked as an undercover agent before for about 15 months and during this time I obtained evidence in numerous cases which evidence was used to convict persons of crimes involving controlled dangerous substances. I have testified in court for trial in prosecution of violations of Controlled Dangerous Substances in the Parish of East and West Carroll, Caddo, Desoto, and they resulted in convictions or pleas of Guilty."

A motion to suppress was filed and was overruled by the trial judge. The evidence adduced at the motion to suppress showed that the affidavit of Deputy McLaughlin was based upon hearsay evidence obtained from one Larry Duplechian but that the affidavit contained no information to indicate anything about the character of said Duplechian or his reputa-

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tion for truthfulness or reliability and the affidavit did not contain any reason to believe that the hearsay given by Duplechian was reliable. The warrant was thus improperly issued as the affidavit did not contain probable cause for the issuance of a search warrant.

The rules governing the issuance of a search warrant based upon hearsay evidence have been set down by this court in the case of *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed.2d 728, 85 Sup. Ct. 1509, as follows:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the *underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was creditable or his information reliable.* Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a new trial and detached magistrate,' as the Constitution requires, but instead, by police officer 'engaged in the often competitive enterprise of ferreting out crime,' or, as in this case, by an unidentified informant." (Emphasis added.)

The test to be met before issuing a warrant on hearsay testimony is a two-prong test, that is, the circumstances must be stated in the warrant to justify belief in the conclusion drawn by the informer and circumstances must be stated in the warrant to justify belief that the informer is creditable and reliable. In the present case, this test is not met as there is nothing

in the affidavit to indicate that the informant was creditable or reliable since nothing is said on this subject. Furthermore, the circumstances alleged *do not* meet the first test as all that is alleged is that Larry Duplechian got in a car with Billy Chaffin. The affidavit does not state the circumstances under which he is supposed to have sold marijuana or any other facts to justify a belief that such an occurrence took place. Accordingly, it is submitted that the test of Aguilar was not met and that the affidavit was insufficient to justify the issuance of a warrant and because of this insufficiency the search made was illegal and evidence gained in that search should have been suppressed by the Trial Court. The failure of the Trial Court to suppress this evidence and the failure of the State Supreme Court to overrule the Trial Court on this is in direct conflict with mandates of this court and Aguilar case setting forth standards for the issuance of a search warrant.

The search referred above occurred on August 26, 1974 and this was a full fifty days after the incident referred to in the search warrant which purported to be the basis for the issuance of the search warrant. In view of the fact that fifty days had expired from the time Chaffin was supposed to have been in possession of marijuana there can be no probable cause to believe that he still had marijuana in his possesion on August 26, 1974 as the time lapse is entirely two great to sustain a belief of probable cause. Accordingly, since there was no probable cause the search warrant was improperly issued. This gap in time clearly violates the requirement of the 4th and 14th amendments of the United States Constitution which require probable

causes as the basis for the issuance of a search warrant. This requirement of timeliness is elaborated on at 68 *Am.Jur.2d* 728, where it is explained that:

> "The proof of probable cause which must be made before a search warrant may be issued must be a fact so closely related to the time of the issuance of the warrant as to justify a finding of probable cause *at that time*, and whether the proof meets this test must be determined by the circumstances of each case. Generally, it may be said that no more than a reasonable time may have elapsed and that the recital must be a fact so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." (Emphasis added.)

A notation contained at 100 *A.L.R.2d* 525, discusses how much time may be considered reasonable in various cases. That article contains many cases similar to the present one in which warrants were issued but were held to be untimely. These rulings are applicable to the present case, as in the present case there is no reason to believe that a person possessing and selling a substance like marijuana on July 6, 1974, might still be in possession of this marijuana on August 26, 1974. Among cases cited in that annotation similar to the present ones are the following:

Siden v. United States, 99 Fed.2d 241, wherein the court condemned a search warrant based upon an affidavit made 12 days after an isolated sale of whiskey. The court said that one isolated sale of moonshine

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whiskey on the date the affidavit was made when the defendant was unlawfully in possession of intoxicating liquor was inadequate without other facts tending to establish probable cause. In the present case there are no facts stated to establish probable cause except the one alleged sale to Larry Duplechian on July 6th, a full 50 days before the affidavit was made. Likewise, in *People v. Meshlock*, 266 Mich. 600, 198 NW 203, an affidavit for a search warrant of a soft drink place alleging a sale of liquor 21 days before the search warrant was issued was held not to state probable cause necessary to justify a warrant.

In *United States v. Bosch*, 209 Fed.2d 15, a period of 30 days was held to be too long; in *Dandrea v. United States*, 7 Fed.2d, 861, a period of 42 days was held to be too long and the warrant therefore untimely, and *State v. Gardner*, 74 Mont. 33, 240 Pac. 984, evidence of isolated illegal acts committed on January 3rd, were held not to constitute probable cause to believe that like illegal acts have been committed on January 28th.

In *Rupinski v. United States*, 4 Fed.2d 17, a lapse of two months between the time of the observation of the offense and the making of the affidavit was held unreasonable and was held to invalidate the search warrant based upon the affidavit. The Court is particularly referred to the case of *State v. Ingram*, 445 Pac2d 504, which is a 1974 case in which a delay on *one month* from the time the defendant obtained heroin to the time the affidavit was made, was held to preclude a finding that probable cause existed that marijuana was on the premises on the date of the affidavit, and the

case also held that the time gap was not filled by the fact that the defendant was a known narcotics user or by statement, that numerous narcotics users had been entering and departing the premises.

This writer has found no case in which a delay of 50 days between the date information was obtained and the date a warrant was issued had been held to be reasonable. Furthermore, this writer has found no case in which a period of time *anywhere approaching 50 days* has been held reasonable unless there were unusual factual circumstances or information fill the time gap such as information that narcotics would come at a given date in the future or information showing repeated violations of the law which have existed over a very long period of time. In the present case there is nothing contained in the affidavit to fill the time gap and it is submitted that the lapse of 50 days is entirely unreasonable and that because of this lapse of time the affidavit was not sufficient to justify the issuance of a warrant as there was no probable cause to believe that there was marijuana in the possession of Billy Chaffin on August 26th.

Accordingly, the trial court committed reversible error in failing to suppress the evidence obtained this search as the warrant upon which the search was based was improperly issued since the lapse of time was such that there was no longer a probable cause to support a warrant. Thus are the protections of the 4th and 14th Amendments violated.

The trial court committed reversible error in a third way in failing to suppress evidence as the search

warrant did not properly describe the place to be searched. The rule, with regard to the description of the place to be searched can be found at 68 *Am.Jur.2d* 728, where we are told that "although the description of the place to be searched is a vital element of a search warrant, the general rule is that the description is sufficient if the officer with the warrant can, with reasonable effort, ascertain and identify the place intended." This rule is stated by the Louisiana Supreme Court in the case of *State v. Jejin*, 74 So.2d 103, where it is stated that the language contained in the 7th Amendment of the Louisiana Constitution and the 4th amendment of the United States Constitution that "and particularly describing the place to be searched and the person or things to be seized," is to be reasonably interpreted and the word "place" is to be designated with sufficient accuracy to prevent officers from searching the premises of one person under a warrant directed against those of another.

In the present case it is clear and it is acknowledged by the State Supreme Court that the description does not meet this test inasmuch as anyone following the description given in the warrant in the present case would have searched the second house on the east side of the street which was not the residence intended to be searched. Other cases in which the rule is stated include the case of *United States v. Hooper*, 438 Fed.2d 968, where we are told that a search warrant meets the test of particularity where it is not demonstrated by the defendant that anyone who followed the direction set forth in a warrant would not therefrom have arrived at the premises authorized to be searched. It is submitted in the present case that the defendant has in-

deed demonstrated that any one following the directions in the warrant would have arrived at the second house on the east side of the street which is a full six houses away from the Chaffin house and would have searched the wrong house. We are told in the case of *Easley v. State*, 459 So2d. 410, that common sense dictates that the constitutional requirements that search warrants contain a particular description of the property to be searched is intended to aid the executing officer in locating the right property to be searched, as well as to protect innocent property owners from unreasonable search and seizure and to prevent officers from searching the wrong property. Clearly, in the present case, if the description used had been followed, the wrong property would have been searched. Accordingly, it is submitted that the description does not meet the requirements of the Fourth Amendment of the Federal Constitution.

REASONS FOR GRANTING THIS WRIT

The protection against unreasonable search and seizure guaranteed to citizens by the 4th and 14th amendments of the United States Constitution are fundamental rights. The search which is the basis of the conviction in the present case was conducted in open defiance of the Constitutional Rights guaranteed by those amendments. Writs must be granted in this case in order that this injustice may be corrected and others may be prevented.

CONCLUSION

For the foregoing reasons of this petition, a Writ of Certiorari should be granted.

Respectfully submitted,

_____

John Saunders
504 6th Street
Mamou, Louisiana

CERTIFICATE OF SERVICE

I hereby certify that I have mailed, postage prepaid, copies of the foregoing Petition for Certiorari to the Louisiana Supreme Court to opposing counsel, this ____ day of March, 1976.

_____

APPENDIX I

Judgment of the Trial Court

Criminal Session:
Charge: Possession with intent to Distribute Marijuana. Matter continued from last date.

Present: Alfred R. Ryder, District Attorney, defendant present with counsel; John Saunders. State witnesses. 7. Virgil Lee Chamberlain, Jr. 8. Floyd Case.

State rest. Motion for direct verdict denied by the court. Defense. 1. Mrs. Joan Chaffin. 2. Maurice Chaffin. 3. Glen Chaffin 4. Victor Guillory. 5. Billy Chaffin, Defense rest. No rebuttal by the state. Arguments heard. Jury duly charged by the court. The jury retires at 5:40 P.M. for deliveration and returns at 8:29 with the following verdict. March 26th, 1975, we the jury find the defendant Billy Chaffin, GUILTY AS CHARGED, FOREMAN: /s/ Eugene B. Boone. Jury polled. Walter Henry, Jr. and Rita Prater voted not guilty, the remaining jurors voted guilty.

APPENDIX II

Judgment of the Supreme Court

Supreme Court of Louisiana

No. 56627

STATE OF LOUISIANA

versus

BILLY CHAFFIN

Appeal from the
Thirty-Third Judicial District Court,
Parish of Allen, Louisiana.
Honorable Edward M. Mouser, Judge.

Monday, Dec. 8, 1975

DIXON, Justice

The defendant, Billy Chaffin, was charged by bill of information with possession of marijuana with intent to distribute, in violation of R.S. 40:966A. He was convicted in a jury trial on March 26, 1975 and subsequently sentenced to imprisonment for a term of five years and a day. On appeal he relies on five assignments of error.

Assignments of Errors Nos. 1, 2 and 3

The defendant filed a pre-trial motion to suppress certain evidence seized from his residence and vehicle pursuant to a search warrant. To the trial judge's

denial of the motion to suppress the evidence, defendant assigns these errors.

The attack on the search warrant is three-pronged, defendant contending (1) it does not contain probable cause for its issuance because it contains nothing about the reliability of Larry Duplechan; (2) it does not contain probable cause for its issuance because it is based on stale information; (3) the warrant did not properly describe the place to be searched.

Article 162 of the Code of Criminal Procedure states:

> "A search warrant may issue only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, reciting facts establishing the cause for issuance of the warrant.
>
> "A search warrant shall include a reasonable description of the things to be seized. When a warrant authorizes the search of a place, it shall designate the place to be searched. When a warrant authorizes the search of a person, it shall name or describe the person to be searched."

It is well settled that the affidavit must recite facts establishing to the satisfaction of the judge, not the affiant, that probable cause exists for the issuance of the search warrant. State v. Flood, 301 So.2d 637 (La. 1974); State v. Paciera, 290 So.2d 681 (La. 1974).

The factual information which is the foundation for the determination of probable cause must be contained

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in the affidavit. Aguilar v. Texas, 378 U.S. 108 (1964). Mere suspicion or belief is not sufficient to establish probable cause. State v. Wells, 253 La. 925, 221 So.2d 50 (1969).

With these principles in mind, the recitals of the affidavit which served as the basis of the application for the search warrant and its subsequent issuance must be examined. The affidavit in its entirety states:

> "The reason and facts for the request of this Search Warrant are: While working as a Deputy Sheriff for the Sheriff of Allen Parish as an undercover agent, I met Billy Chaffin of Kinder, La. From information received from the Sheriff's office of Allen Parish, and information I received personally from various persons in Kinder, La.. Billy Chaffin was suspected to be a distributor of marijuana and other controlled Dangerous substances. Because of this information, the Sheriff's Office of Allen Parish assigned me to watch the residence of Billy Chaffin, which residence is described above, in Kinder, Allen Parish, La., which residence is occupied by Billy Chaffin's father, and where Billy Chaffin resides, and I then proceeded to keep the Billy Chaffin residence under surveillance. I started writing down the names of persons visiting Billy Chaffin's home and writing down their vehicle license numbers. After a few days the Sheriff's Office advised me to write down the date, time, vehicle make and model and license numbers and on June 1, 1974 I started doing

this, and I attach hereto and make a part of this affidavit the information I obtained while keeping the Billy Chaffin home under surveillance. On the date of July 6, 1974 at approximately 8:10 P.M. I met Larry Duplechan of Kinder, La. and asked him if Billy Chaffin could get me a bag of marijuana that Larry had told me earlier that he would try to get for me. About 8:25 P.M. Billy Chaffin drove up and parked beside Larry, and Larry got in Billy's car and a few minutes later Larry got back in his car. I went back to my trailer and Larry arrived at my trailer at 8:35 P.M. and as he entered the trailer he handed me a bag of what I suspected to be marijuana and I paid Larry $10.00 for the suspected marijuana. I then placed the bag of suspected marijuana in an evidence envelope and later I gave it to Deputy Sheriff Floyd Case. Attached hereto and made a part of this affidavit is my statement of this purchase dated July 6, 1974. I have worked as an undercover agent before for about 15 months and during this time I obtained evidence in numerous cases which evidence was used to convict persons of crimes involving controlled dangerous substances. I have testified in court for trial in prosecution of violations of Controlled Dangerous Substances in the Parish of East and West Carroll, Caddo, DeSoto and they resulted in convictions or pleas of guilty."

The first argument that the affidavit fails to state sufficient facts to satisfy the probable cause requirement because nothing is said about Duplechan's

reliability is without merit. The affidavit states that the affiant herself, after asking Duplechan to see if Chaffin could obtain a bag of marijuana for her, witnessed Chaffin drive up beside Duplechan's car, Duplechan get out of his car and get into Chaffin's, and shortly thereafter return to his car. Ten minutes later, at the affiant's trailer, Duplechan turned over a bag of marijuana to her. Duplechan's reliability is not necessary to establish probable cause since he was acting in response to affiant's request to obtain marijuana from Chaffin. What the affiant saw, while perhaps short of establishing guilt beyond a doubt, was consistent with guilt and established probable cause. State v. Paciera, supra; State v. Hightower, 272 So.2d 363 (La. 1973).

Defendant also contends that there was no probable cause for issuance, because the information was "stale," in that the warrant issued fifty days after the alleged July 6, 1974 transaction. We cannot agree.

The remoteness of the facts used to justify the issuance of a search warrant must be considered in light of the facts and circumstances of each case. State v. Flood, supra. In Flood, we upheld a warrant issued eighty-three days after the alleged crime. Here, surveillance of Chaffin's residence for drug-related activity continued after the July 6, 1974 incident. (Evidence of surveillance, submitted with and made a part of the affidavit, indicated that the investigation of drug-related activity around the Chaffin residence continued at least until August 11, 1974). Moreover, the investigation of Chaffin was just part of a continuing parish-wide effort, culminating in the August 26, 1974

raids, aimed at reducing the illicit drug traffic in Allen Parish.

Affidavits must be tested and interpreted by magistrates and courts in a commonsense and realistic manner. United States v. Ventresca, 380 U.S. 102 (1965), cited with approval in United States v. Harris, 403 U.S. 573 (1971). In the instant case, considering all of the facts before the judge, the information was sufficiently recent so as to justify a finding of probable cause at the time the warrant issued. State v. Humble, 309 So.2d 138 (La. 1975).

Finally, defendant alleges that the warrant did not properly describe the place to be searched. The warrant describes Chaffin's residence as "located on Fourth Street in Kinder, Allen Parish, La., being the second house on the East side South of the intersection with Third Ave. with a chain link fence around the house." In fact, Chaffin's house was the fifth house on the East side South of that particular intersection. Defendant alleges that this flaw is fatal to the warrant. We disagree.

The officers knew which house was in fact Chaffin's residence, since it had been under their surveillance for months prior to the raid. The right house was in fact searched. Moreover, no contraband was found in the house. All of the marijuana introduced into evidence at the trial was found in defendant's car, which was correctly described by make, model, color and license number. See U.S. v. Melancon, 462 F.2d 82 (5th Cir. 1972), cert. den. 409 U.S. 1038 (1972); State v. Lampkin, 253 La. 337, 218 So.2d 289 (1969).

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Assignments of Errors Nos. 1, 2 and 3 are without merit.

Assignments of Errors Nos. 4 and 5

These assignments relate to alleged reversible errors occuring during the district attorney's closing argument to the jury. At one point in his closing argument the district attorney stated:

> "The Louisiana law defines possession as follows: 'Possession can be actual or constructive. Actual possession of a drug is where a person has a drug in his physicial custody. Constructive possession of a drug is where a person does not have the drug in his physical custody, but the drug is subject to his dominion and control.' All right, this was Billy Chaffin's car, it was found in his car, so he would have possession. Under the law, this is constructive possession."

Defendant did not ask for a mistrial, but simply requested a full instruction on the law. There is no allegation that the judge did not instruct the jury properly and completely on the law as it relates to possession of a controlled dangerous substance with intent to distribute. Therefore, there is no merit to defendant's contention that the prosecutor's remarks were so prejudicial as to constitute reversible error. State v. Elam, 312 So.2d 318 (La. 1975).

Finally, defendant objected to the prosecutor's remark:

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> ". . . He's saying young people use it. Some of them will try it and a few of them get hooked or maybe a lot of them get hooked. But the ones that do get hooked, they are hooked for life . . . ."

Defendant contends that the district attorney was going beyond the record, arguing a position that is contested by most medical authorities. Defendant contends that the argument appeals to emotion and substantially prejudiced him and therefore constitutes reversible error.

Without expressing any opinion as to the medical aspects of the issue, we cannot agree with defendant that he was so prejudiced by this remark that his conviction must be reversed for that reason. In State v. Dennis, 250 La. 125, 139, 194 So.2d 720, 725 (1967), we held:

> "Under the jurisprudence of this Court, before a verdict approved by the judge is set aisde on the ground of improper argument, this Court must be thoroughly convinced that the jury was influenced by the remarks, and that they contributed to the verdict. State v. Jackson, 227 La. 642, 80 So.2d 105."

No motion for a mistrial was made, nor was there any objection to the judge's instructions. Thus, we can only conclude that the error, if any, was not of sufficient magnitude to warrant a reversal. State v. Coates, 273 So.2d 282 (La. 1973).

Assignments of Errors Nos. 4 and 5 are without merit.

Accordingly, the conviction and sentence are affirmed.

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